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No. 85-1973

In The
Supreme Court of the United States
October Term, 1986

RICHARD POPE and
CHARLES G. MORRISON,

Petitioners,

vs.

STATE OF ILLINOIS,

Respondent.

ON WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS, SECOND DISTRICT

BRIEF FOR THE PETITIONERS

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QUESTION PRESENTED

Whether contemporary community standards are to be applied to the value element of the tripartite test for obscenity articulated in *Miller v. California*, 413 U.S. 15 (1973).

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OPINIONS BELOW

The opinion of the Appellate Court of the State of Illinois, Second District, in *People v. Pope* is reported at 138 Ill.App.3d 726, 486 N.E.2d 350 (1985). A copy of the opinion is included as Exhibit "A" at page App. 1 in the Appendix to the printed Petition for Certiorari.

The opinion of the Appellate Court of the State of Illinois, Second District, in *People v. Morrison* is reported

at 138 Ill.App.3d 595, 486 N.E.2d 345 (1985). A copy of the opinion is included as Exhibit "B" at page App. 25 in the Appendix to the printed Petition for Certiorari.

JURISDICTION

In the proceedings below, the defendants, Richard Pope and Charles G. Morrison, attacked the Illinois obscenity statute, Ill.Rev.Stat. 1983, ch. 38, ¶ 11-20, as being repugnant to the First and Fourteenth Amendments to the Constitution of the United States. In written opinions filed on November 26, 1985, the Illinois Appellate Court, Second District, specifically rejected this contention. Timely petitions for rehearing were denied by that court on December 31, 1985. The defendants then sought leave to appeal from the Illinois Supreme Court, which was denied on April 2, 1986. A Petition for Writ of Certiorari was filed with this Court on May 30, 1986, and was granted on October 6, 1986. The jurisdiction of this Court rests upon 28 U.S.C. § 1257(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First and Fourteenth Amendments to the Constitution of the United States and the Illinois obscenity statute, Ill. Rev. Stat. 1983, ch. 38, ¶ 11-20, are involved. The text of the First and Fourteenth Amendments is set forth at page App. 1 of the Appendix to this brief. The text of the Illinois obscenity statute is set forth at page App. 1 of the Appendix to this brief.

STATEMENT OF THE CASE

Each of the defendants was charged with the sale of three obscene magazines, with both sales occurring July 21, 1983. (J.A.4,18) In each case, a pre-trial motion to dismiss was filed which asserted, among other things, that the Illinois obscenity statute, as written and construed, was unconstitutional under the First and Fourteenth Amendments of the Constitution of the United States. (J.A.6-10,20-24) A specific reason raised was the statute's failure to require that the value element of the tripartite test for obscenity be adjudged solely on an objective basis as opposed to reference to contemporary community standards. (J.A.8,22) The motions were denied, as confirmed by the trial court's refusal to grant the separate written post-trial motions filed on behalf of the defendants. (J.A.1,3,15-17,27-30)

The case against Charles G. Morrison was heard by a jury in Winnebago County, Illinois, on April 2 and 3, 1984. The only occurrence witness to testify for the State was Rockford Police Detective Steven B. Olson, who went to the Adult Book and Cinema at 519 West State, Rockford, Illinois, on July 21, 1983. (RM.140) A sign on the outside identified the store as an adult bookstore, while any view into the interior was obscured. (RM.166) Upon entering into the store, Detective Olson paid defendant Morrison, who was behind the counter, a fifty cent browsing fee. (RM.143-144) After browsing through the materials in the store, the detective selected three magazines and purchased them from the defendant. The defendant then placed the magazines in a brown paper bag and the detective left the store. (RM.144-150) Morrison was subsequently arrested and charged.

The three magazines were admitted into evidence. (People's Ex. 15, 16, 17; RM.127,147-148,186) Another exhibit reflected that entrance to the store was limited to persons 18 years of age or older. (People's Ex. 1; RM. 127,178,184)

The defendant called two persons to testify on his behalf. A college student testified that he went to various adult bookstores throughout the State of Illinois where he purchased magazines with levels of sexual explicitness comparable to those involved in the defendant's trial. (RM.189-206) Dr. Roderick Bell testified as an expert on public opinion polling and provided the foundation for, and the substantive results of, a community standards survey for the State of Illinois. (RM.233-274)

During the instruction conference, People's Instruction No. 12 was tendered and objected to on the basis that it incorrectly stated the definition of obscenity. (J.A.11; RM.218-219) Defendant's Instructions No. 5 and 6, which would have limited application of contemporary community standards to the first two elements of the definition, were refused. (J.A.13,14; RM.226-227)

The jury found defendant Morrison guilty of obscenity on all three counts. (J.A.1) A post-trial motion was filed, once again raising the constitutional issue, and was denied. (J.A.1,15-17) The defendant was sentenced to a period of twelve months conditional discharge and assessed a fine of $1,500 plus costs. (RM.C2,99)

The trial of Richard Pope, which was held on September 10 and 11, 1984, followed a similar scenario. Detective John Versetti of the Rockford Police Department was the State's sole occurrence witness. At the direction

of his superiors, Detective Versetti went to an adult bookstore at 623 Seventh Street, Rockford, Illinois, on July 21, 1983. (RP.184-185,198) The exterior of the bookstore contained signs identifying it as an adult bookstore and limiting admission to persons 18 years of age and over. (RP.199)

After entering the store, Versetti paid a fifty cent browsing fee to defendant Pope, who was behind the counter. (RP.185-186,191) The detective looked through the materials for ten to fifteen minutes, selected three magazines on his own, and presented them to the defendant at the counter for purchase. (RP.191,201) The defendant advised Versetti that the cash register was not working and that he was new at the store and did not know how to fix it. Versetti was told that if he came back later, the day crew, who would be able to fix the cash register, would be there and he could purchase the magazines at that time. The magazines were placed on a shelf next to the counter. When Versetti returned later, the defendant was still behind the counter and the purchase was completed, with the magazines being placed in a brown paper bag. (RP. 194-196) Those magazines were admitted into evidence. (People's Ex. 1A, 1B, 1C; RP.174,192-193,217)

The defense witnesses once again consisted of the college student, who had purchased comparable materials throughout the State of Illinois, and the testimony of Dr Bell relating to the community standards survey. (RP. 226-245,251-283)

The definitional instruction of obscenity tendered by the defendant was given by the trial judge. (J.A.25) Consistent with prior construction, including the denial of

the motion to dismiss, that instruction applied contemporary community standards to all three elements of the three part test for obscenity.

The jury found the defendant, Richard Pope, guilty of the crime of obscenity on all counts. (J.A.2) After denial of the written post-trial motion (J.A.3,27-30), the defendant was sentenced to concurrent sentences of one hundred twenty days imprisonment on each of the three counts and consecutive fines of $1,000 on each of the three counts. (RP.C2)

Both defendants took timely appeal to the Illinois Appellate Court, Second District. In written opinions filed November 26, 1985, the Illinois Appellate Court, Second District, affirmed the conviction of Charles G. Morrison and affirmed the conviction of Richard Pope, although it vacated the sentence of defendant Pope and remanded the case for resentencing. (Pet.App.1-33)

The constitutional issue presented in this case was summarily rejected by the Illinois Appellate Court in the *Pope* opinion:

> Defendant next challenges the obscenity statute on the basis that a constitutional infirmity exists because an objective standard as opposed to a contemporary community standard should be required in determining if allegedly obscene materials are 'utterly without redeeming social value.' To support this contention, defendant relies heavily on a Wisconsin Supreme Court case (*State v. Princess Cinema of Milwaukee, Inc.* (1980), 96 Wis.2d 646, 292 N.W.2d 807), in which that court refused to further judicially construe the Wisconsin obscenity statute and called upon the Wisconsin legislature to redefine obscenity so as to agree with the most recent United States Supreme Court

> cases in the area of obscenity. However, *Princess Cinema* is distinguishable from the case at bar because Illinois courts have never been reluctant to construe the constitutionality of the Illinois obscenity statute. It should also be noted that, thus far, the United States Supreme Court has never held that an objective standard as opposed to a community one should be applied in adjudging if materials are 'utterly without redeeming value'. (Pet.App.8)

The constitutional issue in *Morrison* was addressed by reference to the *Pope* opinion (Pet.App.28), while the instruction issue was discounted in virtually identical language:

> We choose to dismiss this argument by simply pointing out that the United States Supreme Court has never held that an objective standard as opposed to a community one should be applied in adjudging if materials are 'utterly without redeeming social value.' On the facts of this case, we see no reason why we should hold otherwise. (Pet.App.31)

Rehearing was denied by the Appellate Court in both cases on December 31, 1985. (Pet.App.34-35) Leave to appeal was sought in the Illinois Supreme Court and was denied in both cases on April 2, 1986. (Pet.App.36-37) The defendants sought certiorari in this Court on May 30, 1986, and certiorari was granted October 6, 1986.

SUMMARY OF ARGUMENT

1. In *Miller v. California*, 413 U.S. 15 (1973), this Court articulated First Amendment standards for the regulation of obscenity. The third component of the tri-

partite test requires that the trier of fact determine "whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value." The Illinois obscenity statute at issue, Ill.Rev.Stat. 1983, ch. 38, ¶ 11-20, has been construed to incorporate the *Miller* standards, but has retained as its third element the "utterly without redeeming social value" test of *Memoirs v. Massachusetts*, 383 U.S. 413 (1966). *People v. Ridens*, 59 Ill.2d 362, 321 N.E.2d 264 (1974), cert. denied 421 U.S. 993 (1975).

2. While the *Miller* formulation did not clearly identify the components to which contemporary community standards are to be applied, *Miller* did discuss the underlying questions of fact, "prurient interest" and "patently offensive", in the context of community standards. 413 U.S., at 30. Later, *Smith v. United States*, 431 U.S. 291 (1977) interpreted *Miller* to require application of contemporary community standards to the "prurient interest" and "patently offensive" components, but not to the value determination.

3. *Miller* rejected the concept of national community standards and *Jenkins v. Georgia*, 418 U.S. 153 (1974) stamped the Court's imprimatur upon locally determined community standards. As a result, a value element unfettered by community standards is the only remaining part of the test for obscenity upon which meaningful independent review under a national constitution may be exercised. This conclusion is evidenced by the Court's observation in *Smith* that the value element is "particularly amenable to appellate review". 431 U.S., at 305.

4. The failure of the Illinois obscenity statute, as written and construed, to limit application of contemporary

community standards to the "prurient interest" and "patently offensive" elements, is in conflict with the federal and state courts which have considered the question. *United States v. Heyman,* 562 F.2d 316 (4th Cir. 1977); *Penthouse International Ltd. v. McAuliffe,* 610 F.2d 1353 (5th Cir. 1980); *United States v. Bagnell,* 679 F.2d 826 (11th Cir. 1982), *cert. denied* 460 U.S. 1047 (1983); *United States v. Merrill,* 746 F.2d 458 (9th Cir. 1984), *cert. denied* — U.S. —, 105 S.Ct. 926 (1985); *State v. Princess Cinema of Milwaukee, Inc.,* 96 Wis.2d 646, 292 N.W.2d 807 (1980); *State v. Bartanen,* 121 Ariz. 454, 591 P.2d 546 (1979). Furthermore, few state legislatures have engrafted community standards upon the value consideration.

5. Each of the integral parts of the test for obscenity is instrumental in discharging the function of recognizing protected from unprotected speech. A determination of obscenity made entirely on a parochial "majority view" basis is inconsistent with public policy. To allow such a determination jeopardizes expression of art and literature which may ultimately be found non-obscene.

6. Even if a proper constitutional test were utilized, it would be inappropriate for this Court to evaluate the subject materials. To do so would deprive the defendants of the benefit of an initial jury determination. *Marks v. United States,* 430 U.S. 188, 196, n.12 (1977). The appropriate remedy is reversal of the convictions because of the unconstitutional application of the Illinois obscenity statute. *New York v. Ferber,* 458 U.S. 747, 773 (1982). In addition, since there is no conceivable way in which the statute could be constitutionally applied, it should be

facially invalidated. *Members of City Council v. Taxpayers for Vincent,* — U.S. —, 104 S.Ct. 2118, 2124-2125 (1984); *Terminiello v. City of Chicago,* 337 U.S. 1 (1949).

———o———

ARGUMENT

This case focuses upon the value element of the tripartite test for obscenity articulated in *Miller v. California,* 413 U.S. 15 (1973). That element, which is the third part of the tripartite test, has not previously been subjected to close scrutiny by this Court. On the other hand, the first element, "prurient interest", was the subject of this Court's recent attention in *Brockett v. Spokane Arcades, Inc.,* — U.S. —, 105 S.Ct. 2794 (1985). The second element, "patently offensive", came into consideration in *Jenkins v. Georgia,* 418 U.S. 153 (1974) and also in *Ward v. Illinois,* 431 U.S. 767 (1977). In *Ward,* this Court rejected constitutional attacks upon the same Illinois obscenity statute at issue in this case based on asserted infirmities relating to the "patently offensive" element.

This case comes to the Court in the context of a constitutional attack upon the Illinois obscenity statute, both facially and as applied. From the inception of the criminal charges against them, both of the defendants have contended that the value element of the obscenity test should be objectively determined without reference to contemporary community standards. At the time of their trial, the applicable value element under the Illinois obscenity statute, as construed by the Illinois Supreme Court,

was the "utterly without redeeming social value" standard of *Memoirs v. Massachusetts,* 383 U.S. 413 (1966) instead of the "lacks serious literary, artistic, political, or scientific value" test of *Miller. People v. Ridens,* 59 Ill.2d 362, 321 N.E.2d 264 (1974), cert. denied 421 U.S. 993 (1975). The defendants were afforded the less restrictive test, but it was applied using contemporary community standards.

Subsequent to the convictions of the defendants and the affirmance of those convictions by the Illinois Appellate Court, a new obscenity statute took effect on January 1, 1986, in the State of Illinois (Appendix to Brief, Page App. 4). That statute specifically substituted the "lacks serious literary, artistic, political, or scientific value" test for the "utterly without redeeming social value" standard and unambiguously applied contemporary community standards only to the first two parts of the three part test and not to the value element.

I. IN APPLYING THE CONSTITUTIONAL TEST FOR OBSCENITY, THE VALUE OF MATERIALS MUST BE MEASURED INDEPENDENT OF CONTEMPORARY COMMUNITY STANDARDS.

A. The Value Element Has Served To Limit The Range Of Materials Which May Lose Constitutional Protection Under The First And Fourteenth Amendments.

The value concept appeared in *Roth v. United States,* 354 U.S. 476 (1957), which represented this Court's first journey into the obscenity thicket. In *Roth,* this Court held that obscenity is not within the area of constitutionally protected speech or press. In rejecting the standard of *Regina v. Hicklin,* [1868] L.R. 3 Q.B. 360, which allowed the

material to be judged by the effect of an isolated excerpt upon particularly susceptible persons, the *Roth* Court adopted the following standard:

> [W]hether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest.
>
> 354 U.S., at 489.

Although the Court did not incorporate any value determination as part of the constitutional test, the majority opinion found "implicit in the history of the First Amendment is the rejection of obscenity as utterly without redeeming social importance." 354 U.S., at 484.

Unfortunately, after *Roth,* a majority of the Court would not agree on a test for obscenity until *Miller.* In a splintered decision in *Manual Enterprises, Inc. v. Day,* 370 U.S. 478 (1962), Justice Harlan, joined by Justice Stewart, recognized both the *Roth* "prurient interest" test and a "patent offensiveness" test. The purpose of the "patent offensiveness" component was to rescue those works which might appeal to a prurient interest, but, at the same time, have value. *Manual Enterprises, supra,* at 486-487. In essence, the "patent offensiveness" test, when applied with the national community standard recognized in *Manual Enterprises,* worked to perform a value check on the materials.

Jacobellis v. Ohio, 378 U.S. 184 (1964) was also decided by a divided Court. In his opinion, Justice Brennan, joined by Justice Goldberg, reaffirmed the *Roth* test, utilizing a national standard. At the same time, recognition was given to the fact that, in order to be obscene, material had to be "utterly without redeeming social importance" and that

any material with value which might appeal to the prurient interest was absolutely protected. Social importance could not be weighed against prurient appeal. *Jacobellis, supra,* at 191.

The Court once again grappled with the appropriate test in *Memoirs v. Massachusetts,* 383 U.S. 413 (1966). The plurality opinion articulated a three part test, including a "prurient interest" component, a "patently offensive" factor, and an element of whether the material was "utterly without redeeming social value". The plurality reversed the conviction based upon its determination that the book, *Fanny Hill,* was not utterly without redeeming social value.

The years between *Memoirs* and *Miller* saw no agreement by a majority of the Court on the obscenity issue. The practice during that period was summarized by Justice Brennan in his dissenting opinion in *Paris Adult Theatre I v. Slaton,* 413 U.S. 49 (1973):

> In the face of this divergence of opinion the Court began the practice in *Redrup v. New York,* 386 U.S. 767 (1967), of *per curiam* reversals of convictions for the dissemination of materials that at least five members of the Court, applying their separate tests, deemed not to be obscene.
>
> 413 U.S., at 82. (footnote omitted)

Based on *Roth* and *Memoirs,* it is a safe assumption that considerations of value were an ingredient in the *Redrup per curiam* reversals.

B. Miller And Its Progeny Reflect This Court's Determination That Adjudication Of The Value Element Occur Outside Of Contemporary Community Standards.

In *Miller v. California*, 413 U.S. 15 (1973), the Court established guidelines for the regulation of obscenity consistent with the First and Fourteenth Amendments:

> The basic guidelines for the trier of fact must be: (a) whether 'the average person, applying contemporary community standards' would find that the work, taken as a whole, appeals to the prurient interest, *Kois v. Wisconsin, supra,* at 230, quoting *Roth v. United States, supra,* at 489; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.
>
> 413 U.S., at 24.

In adopting the third feature of the test, the Court specifically rejected the "utterly without redeeming social value" test of *Memoirs, supra.* In addition, it relied upon the availability of an independent review of the constitutional claims by the appellate courts on the issue of obscenity.

While the literal language of the test promulgated by the Court appeared to apply contemporary community standards to only the "prurient interest" element, later discussion by the Court revealed that both "prurient interest" and "patently offensive" were to be judged in light of contemporary community standards:

> Under a National Constitution, fundamental First Amendment limitations on the powers of the States

> do not vary from community to community, but this does not mean that there are, or should or can be, fixed, uniform national standards of precisely what appeals to the 'prurient interest' or is 'patently offensive.' These are essentially questions of fact, and our Nation is simply too big and too diverse for this Court to reasonably expect that such standards could be articulated for all 50 States in a single formulation, even assuming the prerequisite consensus exists.
>
> 413 U.S., at 30.

At the same time, the Court's opinion recognized the important function of the value element:

> The First Amendment protects works which, taken as a whole, have serious literary, artistic, political, or scientific value, regardless of whether the government or a majority of the people approve of the ideas these works represent.
>
> 413 U.S., at 34.

Adoption of an explicit value element unencumbered by contemporary community standards was consistent with the rejection of national community standards. With a national community standard, the Court would have been in a position to make a plenary constitutional review of the materials under the "patently offensive" element, or, perhaps, even under the "prurient interest" element. However, with something less than a national standard, the Court's ability to review those elements would necessarily be limited because of its unfamiliarity with the various and varying communities.

Following *Miller*, the role of the value element and thus the need for its independence was underscored by this Court's opinion in *Jenkins v. Georgia*, 418 U.S. 153 (1974). In *Jenkins*, the Court sanctioned a "community" smaller

than the statewide dimension approved in *Miller* and *Kaplan v. California*, 413 U.S. 115 (1973). While, under *Jenkins*, a state was still free to choose a statewide community standard, it could also select a smaller geographic area. Alternatively, it could leave the precise geographic area unspecified, allowing the "juries to rely on the understanding of the community from which they came as to contemporary community standards". 418 U.S. at 157. *Accord, Hamling v. United States*, 418 U.S. 87, 104. This narrowing of the community left only an independent value element to rescue a work with serious value from an entirely parochial determination of obscenity.

While recognizing that the "patently offensive" inquiry was essentially a question of fact, *Jenkins* was able to decide the case on that component because of the complete absence of any hard-core sexual conduct. However, review on that element is limited. *United States v. Merrill*, 746 F.2d 458 (9th Cir. 1984), cert. denied — U.S. —, 105 S.Ct. 926 (1985). In a borderline case, significant independent constitutional review under a national constitution could occur only upon the value question and only if it was freed from the constraints of contemporary community standards. Recognition of the value element as the primary vehicle for appellate scrutiny was evident in the concurring opinion of Justice Brennan in *Jenkins:*

> After the Court's decision today, there can be no doubt that *Miller* requires appellate courts—including this Court—to review independently the constitutional fact of obscenity. Moreover, the Court's task is not limited to reviewing a jury finding under part (c) of the *Miller* test that 'the work, taken as a whole, lack[ed] serious literary, artistic, political, or scientific value.' *Miller* also requires independent review of a jury's

> determination under part (b) of the *Miller* test that 'the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law.'
>
> 418 U.S., at 163-164.

If there were any lingering doubts as to which features of the *Miller* test were to be evaluated in light of contemporary community standards, *Smith v. United States*, 431 U.S. 291 (1977) appeared to lay them to rest. *Smith's* reading of *Miller* was discernible from the outset:

> In *Miller v. California*, 413 U.S. 15 (1973), this Court rejected a plea for a uniform national standard as to what appeals to the prurient interest and as to what is patently offensive; the Court held, instead, that these essentially were questions of fact to be measured by contemporary standards of the community.
>
> 431 U.S., at 292-293.

Later, the Court extensively discussed the community standards issue:

> The phrasing of the *Miller* test makes clear that contemporary community standards take on meaning only when they are considered with reference to the underlying questions of fact that must be resolved in an obscenity case. The test itself shows that appeal to the prurient interest is one such question of fact for the jury to resolve. The *Miller* opinion indicates that patent offensiveness is to be treated in the same way. 413 U.S., at 26, 30. *See Hamling v. United States*, 418 U.S., at 104-105. The fact that the jury must measure patent offensiveness against contemporary community standards does not mean, however, that juror discretion in this area is to go unchecked. Both in *Hamling* and in *Jenkins v. Georgia*, 418 U.S. 153 (1974), the Court noted that part (b) of the *Miller* test contained a substantive component as well. The kinds

> of conduct that a jury would be permitted to label as 'patently offensive' in a § 1461 prosecution are the 'hard core' types of conduct suggested by the examples given in *Miller*. *See Hamling v. United States*, 418 U.S., at 114; *cf. Jenkins v. Georgia*, 418 U.S., at 160-161. Literary, artistic, political, or scientific value, on the other hand, is not discussed in *Miller* in terms of contemporary community standards. See generally F. Schauer, The Law of Obscenity 123-124 (1976).
>
> 431 U.S., at 300-301.

The *Smith* opinion made repeated reference to the proposition that "prurient interest" and "patent offensiveness" must be judged in light of contemporary community standards. 431 U.S., at 302, 303, 308, 309. *Smith* also recognized that the value element had to be met before a conviction could be upheld and that "this determination is particularly amenable to appellate review". 431 U.S., at 305.

In summary, even prior to *Miller*, the intrinsic value of a work served as a safety check upon a finding of obscenity. Under *Miller* and *Smith*, the Court continued to rely on a value element for control purposes. With the abandonment of national standards in *Miller* and the advent of local standards in *Jenkins*, a value element free of community standards was necessary in order to exercise any meaningful appellate review under a national constitution. The existence of such an unrestrained component was exemplified by the recognition of its particular reviewability in *Smith*.

At the same time, it must be remembered that any initial determination of obscenity is generally left to a jury. An independent value element enhances First Amend-

ment rights on that level as well. It allows a jury, in the first instance, to give protection to material which the community may subjectively consider valueless, but which, objectively viewed, meets the appropriate value standard.

C. The Circuit Courts Of Appeal And Other State Courts Which Have Considered This Issue Have Followed The Lead Of Miller And Smith.

Four circuit courts of appeal have recognized that contemporary community standards are to be applied only to the first two parts of the test for obscenity and not to the value component. *United States v. Heyman*, 562 F.2d 316 (4th Cir. 1977); *Penthouse International Ltd. v. McAuliffe*, 610 F.2d 1353 (5th Cir. 1980); *United States v. Bagnell*, 679 F.2d 826 (11th Cir. 1982), cert. denied 460 U.S. 1047 (1983); *United States v. Merrill*, 746 F.2d 458 (9th Cir. 1984), cert. denied — U.S. —, 105 S.Ct. 926 (1985). In *Heyman*, the defendant's conviction was reversed because of a jury instruction which directed the jury to apply contemporary community standards to all three ingredients of the *Miller* test, including the value element. Similarly, while analyzing the standards to follow in reviewing the obscenity *vel non* of the materials at issue, *McAuliffe*, *Bagnell*, and *Merrill* all concluded that community standards were to be applied only to the "prurient interest" and to the "patently offensive" questions and not to the value element. *McAuliffe* and *Bagnell* specifically relied upon *Smith*. 610 F.2d at 1363; 679 F.2d at 835.

Two state supreme courts have also come to similar conclusions. In *State v. Princess Cinema of Milwaukee, Inc.*, 96 Wis.2d 646, 292 N.W.2d 807 (1980), the Wisconsin

Supreme Court specifically held that an objective test and not community standards had to be used in determining which material "lacks serious literary, artistic, political, or scientific value". Relying on *Smith*, the Wisconsin Supreme Court overruled an earlier decision which had held that contemporary community standards were to be applied to all three elements of the constitutional test. As a result of the infirmity, the Court invalidated the entire Wisconsin obscenity statute on overbreadth grounds, refusing to engage in any further judicial construction.

In *State v. Bartanen*, 121 Ariz. 454, 591 P.2d 546 (1979), the Arizona Supreme Court held that it was appropriate for a jury instruction to apply community standards to both the "prurient interest" and "patently offensive" elements. Subsequent to that decision, the Arizona obscenity statute was amended to specifically provide for application of community standards to those parts of the obscenity definition. Ariz. Rev. Stat. Ann. § 13-3501(2)(a), (b) (Supp. 1986)

It is apparent that no appellate court, state or federal, has reached a conclusion consistent with that of the Illinois Appellate Court in the cases of these defendants. The same may be said of most of the various state legislatures.

D. The Majority Of The States Which Have Legislatively Acted To Explicitly Extend Community Standards Beyond A Single Element Have Limited Their Application To The First Two Components.

In addition to Arizona, the states of Colorado, Iowa, Mississippi, North Dakota, Rhode Island, South Carolina,

Texas and Wyoming have statutes which explicitly apply community standards to the first two elements of the obscenity formulation. Colo. Rev. Stat. § 18-7-101(2), (4) (1986); Iowa Code Ann. § 728.4 (Supp. 1986); Miss. Code Ann. § 97-29-103(1), (4) (Supp. 1986);[1] N.D. Cent. Code § 12.1-27.1-01(4), (7) (1985); R.I. Gen. Laws § 11-31-1 (1981); S.C. Code Ann. § 16-15-260(a),(c),(e) (Law Co-op 1976); Tex. Penal Code Ann. § 43.21(a)(1) (Vernon 1986 Supp.); Wyo. Stat. § 6-4-301(a)(iii) (1983). Furthermore, as noted earlier, the new Illinois obscenity statute, which took effect January 1, 1986, explicitly applies contemporary community standards to the "prurient interest" and "patently offensive" elements, while omitting it from the value element. Ill.Rev.Stat. 1985, ch. 38, ¶ 11-20 (Appendix to Brief, Page App. 4).

Three states have obscenity statutes which, on their face, apply contemporary community standards to all three elements of the tripartite test. These include Connecticut, Florida, and Missouri. Conn. Gen. Stat. Ann. § 53a-193(a) (West 1985); Fla. Stat. Ann. § 847.07(2) (West 1976 & Supp. 1986); Mo. Ann. Stat. § 573.010(9) (Vernon Supp. 1986). Additionally, West Virginia has an enabling statute which follows the same format. W.Va. Code § 7-1-4(4) (1984).

Seven states currently have no statutes which proscribe the dissemination of sexually explicit materials to

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[1] *But see, Goldstein v. Allain,* 568 F.Supp. 1377 (N.D. Miss. 1983) [preliminary injunction entered against enforcement of statute].

adults (Alaska, Maine, Montana, Oregon,[2] South Dakota, Vermont, and Wisconsin). The remainder of the states either have statutes which, on their face, track the language of *Miller*, or make no reference to contemporary community standards. E.g. Kan. Stat. Ann. § 21-4301(2)(a) (1981); N.C. Gen. Stat. § 14-190.1(b) (1986); N.Y. Penal Law § 235.00(1) (McKinney 1980); Mich. Comp. Laws Ann. § 752.362(5) (Supp. 1986).

Fourteen states, then, have legislatively imposed community standards beyond the "prurient interest" feature of the *Miller* test. Out of those fourteen, ten have applied contemporary community standards to only the first two elements, while four have applied contemporary community standards to all three elements. The message sent by a plurality of the state legislatures on the community standards issue bespeaks a concern for the proper application of the value element of the obscenity test.

E. Protected Expression Is Endangered When Community Standards Are Allowed To Override Value.

The concept of community standards impacts not only the lower courts under the constitutional definition of obscenity, but also individuals and organizations at large within society. Across the United States the importance of contemporary community standards and its place within the definition of obscenity remain the subject of significant

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[2] *See State v. Henry*, 78 Or.App. 392, 717 P.2d 189 (1986) [statutory definition of "obscene" unconstitutionally vague under state constitution].

debate. The major purpose for the definition of obscenity is to provide a "separating function" for determination of protected from unprotected speech, and, depending on the viewpoint of the individual or the organization, the application of community standards to the value element of the test for obscenity is critical in approaching that separating function.

Each of the three elements of obscenity serves as a separate and independent check on the suppression of protected expression. The "prurient interest" element, from the outset of its pronouncement in *Roth*, has been tied to community attitudes, and has wide public as well as legal acceptance based on usage. The "patent offensiveness" component also relies in its application to community thought concerning the acceptability of depictions or descriptions of specified sexual conduct in books or films. The specificity requirement announced by this court in *Miller* also provides notice to the disseminator about the potential criminality of his acts based on the level of sexual candor, accomplishing another important purpose under criminal law, as well as addressing interests of freedom of expression. The incorporation of community standards into these two aspects of the obscenity test is wholly consistent with public and constitutional policy.

The significance of the value element "utterly without redeeming social value" for purposes of this discussion is entirely different from the other independent checks. Considering value presents the last opportunity for the trier of fact or a court upon independent constitutional review to focus upon the material itself. Notwithstanding its offensiveness to the relevent community, communication

may be "saved" by its value. This permits dissent and controversy in the advocacy of ideas in materials of a sexual nature. The legal survival of a book or magazine may very well depend upon the opportunity to escape condemnation permitted by usage of the value element. A vigorous and robust sexual debate is possible in the marketplace because value is not tied to community standards.

The danger attendant to construing "community standards" as applying to all of the tests for obscenity, including the value test, are illustrated by the recent recommendations of the Attorney General's Commission on Pornography. The Commission was established under the authority of the Federal Advisory Committee Act, 5 U.S.C. App.2, 86 Stat. 770 (1972), as amended by 90 Stat. 1241, 1247 (1976). It was formally created on May 20, 1985, when Attorney General Edwin Meese designated its eleven members. Over the course of eleven months, the Commission conducted public hearings and received information under its mandate to study the "problem of pornography" with a view to making recommendations about solving the problem. The viewpoints expressed by the majority of the commissioners were the first major non-legal public pronouncements on sexually explicit materials since the President's Commission Report on Obscenity and Pornography was released in 1970.

In the section of the Commission's report concerning legal aspects of the *Miller* test for obscenity, the Commission footnoted that local community standards did not apply to the value component of the *Miller* test:

> The third facet of the *Miller* test, that the work lack 'serious literary, artistic, political, or scientific value,' is never in any event to be determined by reference

> to local standards. Here the frame of reference must in all cases be national. *Smith v. United States*, 431 U.S. 291 (1977).
>
> Attorney General's Commission on Pornography, Final Report, July, 1986, n. 36 at p. 259.

Seemingly, the Commission acknowledged that the legal position espoused by defendants Pope and Morrison was legally correct and yet, its official recommendations regarding private citizen activity undermine the legal findings and the purpose of non-application of local community standards to the value test.

In a section entitled "The Role of Private Action", the Commission insisted that citizenry with an anti-pornography viewpoint had a First Amendment right to speak out, reject and condemn that which would otherwise be protected by the First Amendment. The Commission noted:

> That governmental action against a certain variety of communication is unwise and unconstitutional does not mean that the communication is valuable, and does not mean that society is better off for having it. . . . That the Communist Party is a lawful organization does not prevent most Americans from finding its tenets abhorrent, and the same holds true for a wide variety of sexually oriented material. Much of that material is . . . protected by the First Amendment, but it does not follow that the material is harmless, or that its proliferation is good for society.
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> * * *
>
> Communities are made up by what people say and do, by what people approve, and what people disapprove, and by what people tolerate and by what people reject. For communities and for the sense of community, community acceptance and community condemnation are central to what community is.

> Attorney General's Commission on Pornography, Final Report, pp. 419-420.

Armed with revelations about what constitutes a community within the meaning of community standards, the Commission arrived at suggestions for citizen involvement. In the Commission's view this would "aid in establishing and maintaining a community standard". (Page 1324). Specifically, in Suggestion 10, the Committee recommended that "[c]itizens can use grassroots efforts to express opposition to pornographic materials to which they object". The Commission elaborated:

> Some types of pornographic materials may be harmful, offensive and incompatible with certain community values, but nonetheless fall short of the legal standard for prosecution as obscenity. In these instances grassroots efforts may be an effective countermeasure. Grassroots actions are measures initiated and coordinated privately by citizens, without governmental intervention.
>
> Attorney General's Commission on Pornography, at p. 1339.

The posture taken by this governmental commission is of no small moment on the issue before the Court. It suggests that art or literature can and should be subject to rejection depending on the views of individual citizens, thereby eradicating the constitutional separating function manifested by the value element. The Commission's Report is the embodiment of a governmental policy that would work substantial harm on the distribution or exhibition of non-obscene sexually explicit materials. Only staunch adherence to the *Miller* concept of community standards and its intended constitutional protection to art and literature

will free our society from a mandated moral viewpoint of an asserted majority of citizens.

In the context of a criminal obscenity case, prospective jurors receive mixed signals about the role community standards plays in the definition of obscenity. The common notion suggests that the local community can reject what it deems offensive regardless of its value. Anti-pornography forces provide heavy emphasis to support this conclusion that a "majority rule" of a local community can determine that material is worthless and therefore obscene. McGeady, "Outlawing Pornography: What We Gain, What We Lose", *Human Rights,* Spring 1985. On the other hand, contrasting viewpoints express the fear that even those who are serious about arts and literature will have to write with a fine point or paint with a tasteful brush to avoid moral censorship under application of the present concept of community standards. Vonnegut, "He Leadeth Us from Porn. God Bless You, Edwin Meese!" *Nation,* 1/25/86, p. 65.

Acting on *Miller's* suggestion, Illinois has elected to utilize a statewide community standard in its test for obscenity. *People v. Ridens,* 59 Ill.2d 362, 371, 321 N.E.2d 264, 269 (1974), *cert. denied* 421 U.S. 993 (1975). Prior to the recent amendment to the Illinois Obscenity Statute (Ill.Rev.Stat. 1985, ch. 38, ¶11-20), Illinois courts had never construed the predecessor statute to limit application of these statewide standards to the first two elements of the test. Thus, the statute lacked the proper checks because it permitted a value determination based on community standards. Expressions of art and literature were therefore jeopardized under such a statute when the concept of community standards was applied in the "majority rule" sense.

For the First Amendment to continue to have its paramount effect on the nation's discourse, this Court must unweave the web of confusion that permeates the concept of community standards, and the value element. Those standards are geographically based because it is prudent to do so in our federal system, where the state's role in enforcing criminal law is of predominant importance. Limitation of such geographic standards to the first two elements of the test for obscenity is logical because each of those two elements is independent of the value element, and serves a separate purpose. Value determination cannot be a result of the majority vote of the populous that material has value and instead, rests upon an independent value test and an objective review of the material itself.

Defendants urge that they face conviction and incarceration based on a majority viewpoint of the worth of the materials they were disseminating, and not the value of materials. This offends the First Amendment principles set forth by this court in *Miller*. It also represents a danger to putative criminal defendants who must decide whether to disseminate communicative items on the basis of public attitudes about obscenity, without giving any consideration to value. In short, a value determination based upon application of contemporary community standards permits the suppression of protected speech according to the tenor of the times. This cannot be constitutionally tolerated.

II. THE ILLINOIS OBSCENITY STATUTE IS UNCONSTITUTIONAL, BOTH ON ITS FACE AND AS APPLIED TO THE DEFENDANTS, AND REVERSAL OF THEIR CONVICTIONS IS REQUIRED.

The defendants assert their personal constitutional rights under the First and Fourteenth Amendments to the Constitution of the United States. They directly challenge the overly broad application of the Illinois obscenity statute to them through its imposition of contemporary community standards upon the value element of the three part obscenity test applicable in Illinois. The issue was squarely presented to the Illinois Appellate Court, which declined to narrow the reach of the statute and refused to overturn the defendants' convictions.

The defendants contend that the materials upon which they were tried could be deemed constitutionally protected by a jury administering the Illinois "utterly without redeeming social value" test, unrestrained by community standards. That they are entitled to have a jury make that initial determination is illustrated by *Marks v. United States*, 430 U.S. 188 (1977). In *Marks*, the defendant was charged with a federal obscenity violation arising before the *Miller* decision. This Court held that the defendant was entitled to the benefit of the less restrictive "utterly without redeeming social value" test of *Memoirs*. In so holding, the Court rejected the argument that the materials were obscene under either test and emphasized the importance of a jury determination:

> The Court of Appeals stated, apparently without reviewing the materials, 520 F.2d, at 923 n. 1 (McCree, J., dissenting), that in its opinion the materials here were obscene under either *Memoirs* or *Miller*. 520 F.2d, at 922. Such a conclusion, absent other depend-

> able means of knowing the character of the materials, is of dubious value. But even if we accept the court's conclusion, *under these circumstances it is not an adequate substitute for the decision in the first instance of a properly instructed jury, as to this important element of the offense* under 18 U.S.C. § 1465.
>
> 430 U.S., at 196, n. 12 (emphasis added).

The remedy to be exercised in the case of a criminal statute which has been unconstitutionally applied was addressed in *New York v. Ferber*, 458 U.S. 747 (1982):

> Indeed, the Court's practice when confronted with ordinary criminal laws that are sought to be applied against protected conduct is not to invalidate the law *in toto*, but rather to reverse the particular conviction. *Cantwell v. Connecticut*, 310 U.S. 296 (1940); *Edwards v. South Carolina*, 372 U.S. 229 (1973).
>
> 458 U.S., at 773.

The reason for reversal, of course, is that the defendant has engaged in speech protected by the First and Fourteenth Amendments, for which he may not be punished. *Cf. Cox v. Louisiana*, 379 U.S. 536 (1965); *Jenkins v. Georgia*, 418 U.S. 153 (1974). In the case of Charles G. Morrison and Richard Pope, that protected expression lies between a determination of value with and without application of contemporary community standards.

The defendants also assert the facial invalidity of the Illinois obscenity statute. Such facial challenges have been the subject of recent discussion by the Court:

> There are two quite different ways in which a statute or ordinance may be considered invalid 'on its face' —either because it is unconstitutional in every conceivable application, or because it seeks to prohibit such a broad range of protected conduct that it is unconstitutionally 'overbroad.'
>
> • • •

> The seminal cases in which the Court held state legislation unconstitutional 'on its face' did not involve any departure from the general rule that a litigant only has standing to vindicate his own constitutional rights. In *Stromberg v. California*, 282 U.S. 359, 51 S.Ct. 532, 75 L.Ed. 1117 (1931) and *Lovell v. Griffin*, 303 U.S. 444, 58 S.Ct. 666, 82 L.Ed 949 (1938), the statutes were unconstitutional as applied to the defendants' conduct, but they were also unconstitutional on their face because it was apparent that any attempt to enforce such legislation would create an unacceptable risk of the suppression of ideas. In cases of this character a holding of facial invalidity expresses the conclusion that the statute could never be applied in a valid manner. Such holdings invalidated entire statutes, but did not create any exception from the general rule that constitutional adjudication requires a review of the application of a statute to the conduct of the party before the Court.
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> *Members of the City Council v. Taxpayers for Vincent*, — U.S. —, —, 104 S.Ct. 2118, 2124-2125 (1984) (footnotes omitted);

See also New York v. Ferber, 458 U.S. 747, 768, n. 21 (1982); *Secretary of State of Maryland v. Joseph H. Munson Co.*, — U.S. —, 104 S.Ct. 2839, 2852, n. 13 (1984).

If this Court should hold that the value element must be measured independent of contemporary community standards, there would be no conceivable way in which the statute could be validly applied. In any prosecution, under the statute, there would be a risk of conviction on materials which lie in that zone between "utterly without redeeming social value" objectively applied and "utterly without redeeming social value" measured by the standards of the community. Consequently, facial invalidation of the statute, together with reversal of the defen-

dants' convictions, is appropriate. *Members of City Council v. Taxpayers for Vincent, supra; Stromberg v. California,* 283 U.S. 359 (1931); *Lovell v. Griffin,* 303 U.S. 444 (1938); *Terminiello v. City of Chicago,* 337 U.S. 1 (1949).

CONCLUSION

A review of this Court's opinions in *Miller* and *Smith* yields the conclusion that contemporary community standards are to be applied only to the first two parts of the tripartite definition of obscenity and not to the value element. Such a result is entirely consistent with the greater independent constitutional review which may be exercised on that part of the test. The Illinois obscenity statute, Ill.Rev.Stat. 1983, ch. 38, ¶ 11-20, as written and construed and as applied in this case, is constitutionally infirm under the First and Fourteenth Amendments because it permits community standards to be applied to the value component of the constitutional test. As a result, that statute should be held unconstitutional and the defendants' convictions should be reversed.

Respectfully submitted,

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APPENDIX

First Amendment
Constitution of the United States

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Fourteenth Amendment
Constitution of the United States

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; or shall any State deprive any person of life, liberty, or property, without due process of law nor deny to any person within its jurisdiction the equal protection of the laws.

Illinois Obscenity Statute, Ill.Rev.Stat. 1983, ch. 38, ¶11-20

§ 11-20. Obscenity. (a) Elements of the Offense.

A person commits obscenity when, with knowledge of the nature or content thereof, or recklessly failing to exercise reasonable inspection which would have disclosed the nature or content thereof, he:

(1) Sells, delivers or provides, or offers or agrees to sell, deliver or provide any obscene writing, picture, record or other representation or embodiment of the obscene; or

(2) Presents or directs an obscene play, dance or other performance or participates directly in that portion thereof which makes it obscene; or

(3) Publishes, exhibits or otherwise makes available anything obscene; or

(4) Performs an obscene act or otherwise presents an obscene exhibition of his body for gain; or

(5) Creates, buys, procures or possesses obscene matter or material with intent to disseminate it in violation of this Section, or of the penal laws or regulations of any other jurisdiction; or

(6) Advertises or otherwise promotes the sale of material represented or held out by him to be obscene, whether or not it is obscene.

(b) Obscene Defined.

A thing is obscene, if, considered as a whole, its predominant appeal is to prurient interest, that is, a shameful or morbid interest in nudity, sex or excretion, and if it goes substantially beyond customary limits of candor in description or representation of such matters. A thing is obscene even though the obscenity is latent, as in the case of undeveloped photographs.

(c) Interpretation of Evidence.

Obscenity shall be judged with reference to ordinary adults, except that it shall be judged with reference to children or other specially susceptible audiences if it appears from the character of the material or the circumstances of its dissemination to be specially designed for or directed to such an audience.

Where circumstances of production, presentation, sale, dissemination, distribution, or publicity indicate that material is being commercially exploited for the sake of its prurient appeal, such evidence is probative with respect to the nature of the matter and can justify the conclusion that the matter is utterly without redeeming social imporance.

In any prosecution for an offense under this Section evidence shall be admissible to show:

(1) The character of the audience for which the material was designed or to which it was directed;

(2) What the predominant appeal of the material would be for ordinary adults or a special audience, and what effect if any, it would probably have on the behavior of such people;

(3) The artistic, literary, scientific, educational or other merits of the material, or absence thereof;

(4) The degree, if any, of public acceptance of the material in this State;

(5) Appeal to prurient interest, or absence thereof, in advertising or other promotion of the material;

(6) Purpose of the author, creator, publisher or disseminator.

(d) Sentence.

Obscenity is a Class A misdemeanor. A second or subsequent offense is a Class 4 felony.

(e) Prima Facie Evidence.

The creation, purchase, procurement or possession of a mold, engraved plate or other embodiment of obscenity specially adapted for reproducing multiple copies, or the possession of more than 3 copies of obscene material shall be prima facie evidence of an intent to disseminate.

(f) Affirmative Defenses.

It shall be an affirmative defense to obscenity that the dissemination:

(1) Was not for gain and was made to personal associates other than children under 18 years of age;

(2) Was to institutions or individuals having scientific or other special justification for possession of such material.

Amended by P.A. 77-2638, § 1, eff. Jan. 1, 1973.

Illinois Obscenity Statute, Ill.Rev.Stat. 1985, ch. 38, ¶11-20 (effective January 1, 1986)

§ 11-20. Obscenity. (a) Elements of the Offense. A person commits obscenity when, with knowledge of the nature or content thereof, recklessly failing to exercise reasonable inspection which would have disclosed the nature or content thereof, he:

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(2) Presents or directs an obscene play, dance or other performance or participates directly in that portion thereof which makes it obscene; or

(3) Publishes, exhibits or otherwise makes available anything obscene; or

(4) Performs an obscene act or otherwise presents an obscene exhibition of his body for gain; or

(5) Creates, buys, procures or possesses obscene matter or material with intent to disseminate it in violation of this Section, or of the penal laws or regulations of any other jurisdiction; or

(6) Advertises or otherwise promotes the sale of material represented or held out by him to be obscene, whether or not it is obscene.

(b) Obscene Defined.

Any material or performance is obscene if: (1) the average person, applying contemporary adult community standards, would find that, taken as a whole, it appeals to the prurient interest; and (2) the average person, applying contemporary adult community standards, would find that it depicts or describes, in a patently offensive way, ultimate sexual acts or sadomasochistic sexual acts, whether normal or perverted, actual or simulated, or masturbation, excretory functions or lewd exhibition of the genitals; and (3) taken as a whole, it lacks serious literary, artistic, political or scientific value.

(c) Interpretation of Evidence.

Obscenity shall be judged with reference to ordinary adults, except that it shall be judged with reference to children, or other specially susceptible audiences if it appears from the character of the material or the circumstances of its dissemination to be specially designed for or directed to such an audience.

Where circumstances of production, presentation, sale, dissemination, distribution, or publicity indicate that material is being commercially exploited for the sake of its prurient appeal, such evidence is probative with respect to the nature of the matter and can justify the conclusion that the matter is lacking in serious literary, artistic, political or scientific value.

In any prosecution for an offense under this Section evidence shall be admissible to show:

(1) The character of the audience for which the material was designed or to which it was directed;

(2) What the predominant appeal of the material would be for ordinary adults or a special audience, and what effect, if any, it would probably have on the behavior of such people;

(3) The artistic, literary, scientific, educational or other merits of the material, or absence thereof;

(4) The degree, if any, of public acceptance of the material in this State;

(5) Appeal to prurient interest, or absence thereof, in advertising or other promotion of the material;

(6) Purpose of the author, creator, publisher or disseminator.

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Obscenity is a Class A misdemeanor. A second or subsequent offense is a Class 4 felony.

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It shall be an affirmative defense to obscenity that the dissemination:

(1) Was not for gain and was made to personal associates other than children under 18 years of age;

(2) Was to institutions or individuals having scientific or other special justification for possession of such material.

Amended by P.A. 84-709, § 1, eff. Jan. 1, 1986.